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Hazmi bin Majid v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-291–08 OF 2021
HANIPAH FARIKULLAH, AHMAD NASFY AND SEE MEE CHUN JJCA
5 MAY 2023

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant convicted for offence of murder of baby — Whether injury was sufficient in ordinary course of nature to cause death — Whether High Court misdirected by pre-empting finding of guilt based on one-sided evidence at close of prosecution case — Whether appellant could relied on defence of intoxication under s 85(2)(b) of Penal Code — Penal Code ss 85(2)(b) & 302

D

This was an appeal against the decision of the High Court in convicting the appellant for the offence of murder and sentencing him to death pursuant to s 302 of the Penal Code. The prosecution case was based on evidence of the appellant's wife who was the babysitter of the deceased testifying that the appellant had offered to take care of the deceased and to bathe her before the deceased was brought to the hospital and eventually passed away. It was affirmed by PW5 who had conducted the post mortem that the cause of death was due to 'blunt impact to the head' and that the head injury was sufficient in the ordinary course of nature to cause death. The High Court found that although there were no eyewitnesses, the inference of 'last seen together' was invoked and consequently, prima facie case was established. In defence, the appellant argued that: (a) he had just playfully pushed the deceased to the toto laid out on the floor; (b) he denied inflicting injuries on the deceased and swinging her cradle like a pendulum against the wall or throwing her on the floor; (c) his finger accidentally penetrated the deceased's vagina and caused minor bleeding which he had wiped with a towel which he then washed; and (d) he was in a state of intoxication from having consumed the drug syabu. The High Court found that the defence was unreasonable and mere denial, and that the prosecution had proved its case beyond reasonable doubt, as such, the appellant was convicted and sentenced to death. The appellant raised the following issues in the present appeal: (i) although PW5 had stated the head injuries which resulted in death was only likely to cause death, the High Court had held it as an injury which was sufficient in the ordinary course of nature to cause death — related to this was that the High Court had failed to make an express finding that the fatal injury was intentionally inflicted and this was a serious misdirection; (ii) the High Court had misdirected by pre-empting the finding of guilt based on the one-sided evidence at the close of the prosecution

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A case; and (iii) the High Court had declined to consider the defence of intoxication and this amounted to a misdirection in law.

Held, affirming the decision of the High Court, and dismissing the appeal:

B (1) Contrary to the appellant's submission, the High Court did expressly find that the fatal head injury was intentionally caused by the appellant. The injuries inflicted on the baby and the evidence of the pathologist were sufficient for the High Court to draw an irresistible inference that the injuries were sufficient in the ordinary course of nature to cause death. C The last seen theory was also invoked where the appellant was the only one and the one last seen with the baby. This was as confirmed by none other than his wife, PW13. The court therefore found no merit to the first issue (see paras 38–41).

D (2) The second issue essentially dealt with the burden of proof applicable. The court found that the words 'the accused's defence has failed to raise reasonable doubt on the prosecution case' and 'on the other hand, the prosecution has proved its case beyond a reasonable doubt' which came after the word 'dislodge' in para 86 of the High Court's grounds of judgment would show the correct burden had been used. The court E therefore found no merit to the second issue (see paras 42 & 45–47).

(3) While it may well be that self-infliction of syabu may be considered as a defence under s 85(2)(b) of the Penal Code, what was more significant was the conduct of the appellant prior to, at the time of and after the F offence. In the present case, the court found that the conduct of the appellant prior to, at the time of, and after the offence, were all found to be acts consistent with the commission of the offence and not with the consumption of syabu. So, for instance, the offer of the appellant to take care of the baby, bathe and change her diapers, which were hitherto never G done before. Further, the act of washing the bath towel was an act to dispose of the evidence. Hence, even if the court was to accept that intoxication could be self-inflicted, there was no evidence in the form of conduct to support the defence. The court therefore found not merit in the third issue (see paras 53 & 55–56).

H

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang mensabitkan perayu atas kesalahan membunuh dan menjatuhkannya hukuman mati mengikut s 302 Kanun Keseksaan. Kes pendakwaan adalah berdasarkan I keterangan isteri perayu yang merupakan pengasuh si mati yang memberi keterangan bahawa perayu telah menawarkan diri untuk menjaga si mati dan memandikan si mati sebelum si mati dibawa ke hospital dan akhirnya meninggal dunia. Ia disahkan oleh PW5 yang telah menjalankan bedah siasat bahawa punca kematian adalah disebabkan 'hentaman tumpul di kepala' dan

kecederaan kepala tersebut adalah memadai dalam keadaan biasa untuk menyebabkan kematian. Mahkamah Tinggi mendapati bahawa walaupun tiada saksi mata, inferens 'last seen together' telah digunakan dan seterusnya, kes prima facie telah dibuktikan. Dalam pembelaan, perayu berhujah bahawa: (a) dia hanya secara main-main menolak si mati ke toto yang diletakkan di atas lantai; (b) dia menafikan telah mendatangkan kecederaan kepada si mati dan menghayun buaian si mati seperti pendulum ke dinding atau melemparkannya ke atas lantai; (c) jarinya secara tidak sengaja menembusi faraj si mati dan menyebabkan pendarahan kecil yang telah dilap dengan tuala yang kemudiannya dibasuh; dan (d) dia dalam keadaan mabuk kerana telah mengambil dadah syabu. Mahkamah Tinggi mendapati bahawa pembelaan tersebut adalah tidak munasabah dan penafian semata-mata, dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah, oleh itu, perayu telah disabitkan bersalah dan dijatuhkan hukuman mati. Perayu membangkitkan isu-isu berikut dalam rayuan semasa: (i) walaupun PW5 telah menyatakan bahawa kecederaan kepala yang mengakibatkan kematian hanya berkemungkinan menyebabkan kematian, Mahkamah Tinggi telah menganggapnya sebagai kecederaan yang memadai dalam keadaan biasa untuk menyebabkan kematian — berkaitan dengan perkara ini ialah Mahkamah Tinggi telah gagal membuat dapatan yang jelas bahawa kecederaan maut tersebut telah dilakukan dengan sengaja dan ini merupakan salah arah yang serius; (ii) Mahkamah Tinggi telah tersalah arah dengan membuat jangkaan dapatan bersalah berdasarkan keterangan berat sebelah pada penutupan kes pendakwaan; dan (iii) Mahkamah Tinggi telah menolak untuk mempertimbangkan pembelaan mabuk dan ini merupakan salah arah dalam undang-undang.

Diputuskan, mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan:

(1) Bertentangan dengan hujahan perayu, Mahkamah Tinggi secara jelas mendapati bahawa kecederaan kepala yang membawa maut tersebut adalah dengan sengaja dilakukan oleh perayu. Kecederaan yang dibuat ke atas bayi tersebut dan keterangan pakar patologi adalah mencukupi untuk Mahkamah Tinggi membuat kesimpulan yang tidak dapat disangkal bahawa kecederaan tersebut adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian. Teori 'last seen' juga digunakan di mana perayu adalah satu-satunya dan yang terakhir dilihat bersama bayi tersebut. Ini telah disahkan oleh isterinya sendiri, PW13. Oleh itu mahkamah mendapati tiada merit kepada isu pertama (lihat perenggan 38–41).

(2) Isu kedua pada asasnya berkenaan dengan beban pembuktian yang terpakai. Mahkamah mendapati bahawa perkataan 'the accused's defence has failed to raise reasonable doubt on the prosecution case' dan 'on the other hand, the prosecution has proved its case beyond a reasonable

doubt' yang dinyatakan selepas perkataan 'dislodge' di perenggan 86 alasan penghakiman Mahkamah Tinggi menunjukkan beban yang betul telah digunakan. Oleh itu mahkamah mendapati tiada merit bagi isu kedua (lihat perenggan 42 & 45–47).

(3) Walaupun mungkin tindakan menggunakan syabu boleh dianggap sebagai pembelaan di bawah s 85(2)(b) Kanun Keseksaan, apa yang lebih penting ialah kelakuan perayu sebelum, pada masa dan selepas kesalahan tersebut dilakukan. Dalam kes ini, mahkamah mendapati bahawa kelakuan perayu sebelum, pada masa, dan selepas kesalahan tersebut dilakukan, semuanya didapati sebagai perbuatan yang konsisten dengan pelakuan kesalahan dan bukan dengan pengambilan syabu. Jadi, sebagai contoh, tawaran perayu untuk menjaga bayi, memandikan dan menukar lampinnya, yang sebelum ini tidak pernah dilakukan. Selanjutnya, tindakan membasuh tuala mandi tersebut adalah perbuatan melupuskan bahan bukti. Oleh itu, walaupun mahkamah menerima bahawa mabuk boleh atas penggunaan sendiri, tidak ada keterangan dalam bentuk kelakuan untuk menyokong pembelaan tersebut. Oleh itu mahkamah mendapati tiada merit dalam isu ketiga (lihat perenggan 53 & 55–56).]

Cases referred to

Francis Antonysamy v PP [2005] 3 MLJ 389, FC (folld)
Mohamed Yasin bin Hussin v PP [1976] 1 MLJ 156, PC (refd)
Pubalan a/l Peremal v PP [2020] 5 MLJ 442; [2020] 5 MLRA 504, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Criminal Procedure Code s 402B(1)
Penal Code ss 85(2)(a), (2)(b), 86(3), 299, 300, 300(c)

Appeal from: Criminal Trial No 45B-21–05 of 2019 (High Court, Shah Alam)

T Vijayandran (T Vijay & Co) for the appellant.
Parvin Hameedah Natchiar (with Khairul Aisamuddin bin Abdul Rahman) for the respondent.

See Mee Chun JCA:

INTRODUCTION

[1] The appellant/accused was charged as follows:

Bahawa kamu pada 07.11.2018 antara jam lebih kurang 10:30 pagi hingga jam 01:30 tengahari bertempat di alamat Blok D-2-3, Apartment Sri Cempaka, Jalan 6/3, Seksyen 16, 43650 Bandar Baru Bangi, dalam Daerah Hulu Langat, di dalam

Negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian ke atas seorang kanak-kanak perempuan bernama Nur Muazara Ulfa binti Muhammad Zainal (No. KP: 171210-03-0424), dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

At the conclusion of trial, the appellant was convicted and sentenced to death by the High Court.

[2] The appellant appealed against the conviction and sentence which was dismissed by us. We now give our reasons.

PROSECUTION CASE

[3] On 7 November 2018 at 6.45am, the parents (father, PW11 and mother, PW 16) of the victim baby who was 11 months, sent her to the house of her babysitter (PW13) along with her four years old elder brother (PW19). The baby then was healthy and free from injuries. The house is as stated in the charge.

[4] At approximately 10.30am, the appellant offered to take care of the baby leaving his wife who is PW13, to attend to the household chores. The appellant also bathed the baby and placed her in a cradle in one of the bedrooms. The baby was looked after by the appellant until 12.30pm when the appellant woke up his wife for milk to be prepared as it was said the baby was crying from hunger. The wife tried to feed the baby a small slice of apple who was by then in a weak state, lifeless, had vomited, and short of breath.

[5] With the help of a neighbour, the baby was taken to the Bandar Baru Bangi health clinic, accompanied by the appellant and his wife. Upon arrival at 1.43pm, the baby was unconscious and her face, lips and fingertips were blue. First aid was provided by the medical officer and the baby was referred to Serdang Hospital where she arrived at 2.10pm. PW7, the doctor who lodged the complaint, received the baby in a lifeless state and was informed the baby had choked on food. The baby responded positively to CPR. A further examination was done and there was bleeding on the left side of the baby, the genitals and anus. A First Information Report was lodged.

[6] On 9 November 2018 at 10.55am, the baby was pronounced dead. A postmortem was conducted on the same day by PW5 where the cause of death was stated to be due to 'blunt impact to the head'.

[7] The High Court found that the elements of murder as provided in s 299 read with s 300 of the Penal Code had been proved by the prosecution. The High Court considered the evidence of PW5 that the injury to the baby's head

is sufficient in the ordinary cause of nature to cause death and that it was the appellant who caused the death. The external and internal injuries were extensive. It was also PW5's evidence the injuries were relatively recent, less than three days. PW5's further evidence was that death was due to injury to the head as a result of impact by or on a blunt and hard object and a large surface area. The injuries were not self-inflicted or caused by the baby falling down by herself. There were three injuries on the head. There was re-enactment of the incident using a model of a doll with bricks and according to the baby's weight which showed the head injury can be caused by one swing to the floor and a horizontal swing to the wall.

[8] The High Court in para 46 of the grounds of judgment (GOJ, encl 12, 7–22) stated the actions of the appellant as listed below showed his involvement:

(i) Tiada orang lain yang keluar masuk ke dalam rumah tempat kejadian tersebut antara jama 7 pagi hingga 12.30 tengahari.

(ii) Tertuduh menawarkan diri untuk memandikan, memakaikan pampers dan pakaian mangsa pada hari kejadian.

(iii) Mangsa didengar menangis dengan kuat sebanyak 4 kali sepanjang berada dalam jagaan dan kawalan Tertuduh.

(iv) Tertuduh adalah orang terakhir yang menjaga mangsa.

(v) Tertuduh sentiasa mendukung mangsa dan tidak melepaskan mangsa walaupun mangsa dalam keadaan menangis dan tidak sedarkan diri.

(vi) Tertuduh hanya mendiamkan diri apabila ditanya.

(vii) Tertuduh bertindak melupuskan bukti.

[9] On the time of 7am onwards as stated above, we note that this is with reference to the appellant asking his wife to prepare him a meal at 8am where the wife asked him to care for the baby; the appellant offering to bathe the baby, putting her diapers where both occasions the baby was crying. The baby was fed biscuits at 8.45am. As she was not sleeping, she was left in the living room to play with her brother. The baby was later fed kuey teow soup and as the wife found her to be sleepy, she was carried to the bedroom. This was when the appellant offered to take care of the baby. After some time, the baby was heard to be crying and when asked, the appellant replied nothing was wrong and the wife saw that the appellant was swinging the cradle at a normal speed.

[10] The High Court found that although there were no eyewitnesses, the inference of 'last seen together' was invoked.

[11] The High Court found the appellant had made out a prima facie case in respect of the charge. The appellant was called to enter upon his defence.

THE DEFENCE

[12] The appellant's defence was in the form of a witness statement (D60). Only he gave evidence. He is a barber but was not at work on the day in question. The baby and her brother had been cared by the wife in October 2018 for less than a month and resumed on 7 November 2018. His other evidence as set out in the counsel's submission was as follows:

(i) The accused lives in Blok D-2-3, Apartment Sri Cempaka, Jalan 6/3, Seksyen 16, 43650 Bandar Baru Bangi, Selangor with his wife PW13 and their male child who at the time of the death of the deceased was a little over a year old;

(ii) PW13 earns income babysitting the deceased and her brother who are children of PW16 and PW19;

(iii) On the morning of 7.11.2018 when PW16 left the deceased for babysitting with PW13, the accused was had bathed her and was playing with her;

(iv) While playing with the deceased, the accused said he pushed her playfully to the toto laid out on the floor with pillows on it. It did it about three times and when he attempted it for the fourth time, the deceased cried out loud and he stopped. He said he did not expect his playful action would cause the death of the deceased;

(v) He then cradled the deceased in his arms and did not let her go all the way to the hospital as he was afraid that his action could have caused some injury to the deceased;

(vi) He denied suggestions by the prosecution that all the injuries found on the body of the deceased was inflicted by him. He also denied that he caused the death of the deceased by swinging her cradle like a pendulum against the wall or throwing her on the floor;

(vii) He said that he was only playfully pushing the deceased on to the 'tilam dan toto sepertimana gambar exhibit P6; that he did not throw her on the hard floor; that he never intended to inflict injury on the deceased nor did he have any foresight of any bodily injury to the child.;

(viii) That his finger accidentally penetrated her vagina and caused minor bleeding which he had wiped with a towel which he then washed;

(ix) That he was in a state of intoxication from having consumed the drug syabu.

A FINDING AT THE END OF TRIAL

[13] The High Court found the defence was not reasonable and a mere denial. What was regarded as not reasonable was set out in para 69 of the GOJ as follows:

B

(i) Tertuduh menyatakan hanya bermain dengan si mati dengan membalingnya ke tilam dan toto sepertimana gambar ekshibit P6. Si mati tidak pernah dibalingkannya ke lantai. Perbuatan ini tidak disengajakan oleh Tertuduh dan dia tidak menyangka akan mengakibatkan kematian si mati.

C

(ii) tertuduh menyatakan jarinya telah termasuk ke dalam kemaluan si mati tanpa sengaja dan hanya sedikit sahaja darah yang terkeluar dari kemaluan si mati.

(iii) tertuduh telah mengakui telah membasuh kain tuala si mati tetapi darah yang terlekat disitu hanya sedikit sahaja.

D

(iv) tertuduh menyatakan si mati hanya merengek-rengek sedikit tetapi tidaklah menangis dengan kuat.

(v) tertuduh tidak memaklumkan perbuatannya kepada SP13 kerana katanya SP13 juga tidak bertanya.

E

[14] The appellant's action in washing the bath towel showed an intention to dispose of the evidence. His defence that the baby only whimpered and not cried was contrary to his wife's evidence.

F

[15] The High Court considered PW5's evidence that the head injury was sufficient in the ordinary course of nature to cause death and the injury was the result of a blunt object. This refuted the defence that the baby was thrown on the mattress or toto. At the prosecution case, the evidence that the appellant never threw the baby on the mattress or toto was never put to any witness.

G

[16] The consumption of syabu on the morning in question was said to be self-inflicted and was not a defence of merit.

H

[17] The High Court concluded that the appellant had not raised any reasonable doubt in the prosecution case. The prosecution had proved its case against the appellant beyond a reasonable doubt. There was no doubt that the appellant had killed the baby at the time and place as stated in the charge. All the elements of the offence had been proved.

I

[18] The appellant was found guilty of the offence and convicted as charged. **A**

THE APPEAL

[19] At the appeal, the appellant's counsel raised three main issues. **B**

[20] The first issue was that although PW5 had stated the head injuries which resulted in death was only likely to cause death, the High Court had held it as an injury which is sufficient in the ordinary course of nature to cause death. Related to this was that the High Court had failed to make an express finding that the fatal injury was intentionally inflicted and this was a serious misdirection. **C**

[21] The second issue was that the High Court had misdirected by pre-empting the finding of guilt based on the one-sided evidence at the close of the prosecution case. **D**

[22] The third issue was that the High Court had declined to consider the defence of intoxication and this amounted to a misdirection in law. **E**

OUR DECISION

[23] Before addressing the issues raised by the appellant, we find it helpful to set out ss 299 and 300 of the Penal Code, without the illustrations: **F**

> 299 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> ... **G**
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> 300 Except in the cases hereinafter excepted, culpable homicide is murder —
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> (a) if the act by which the death is caused is done with the intention of causing death;
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> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; **H**
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or **I**
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.'

First issue: Whether the injuries were sufficient in the ordinary course of nature to cause death

[24] The challenge mounted by the appellant stems from s 299 and the words 'as is likely to cause death' and the words in s 300(c) 'sufficient in the ordinary course of nature to cause death'. The prosecution had relied on s 300(c). As alluded to earlier, it was said that although PW5 had stated the head injuries which resulted in death was only likely to cause death, the High Court had held it as an injury which is sufficient in the ordinary course of nature to cause death. This was in reference to paras 15 and 43 (line 3) of the GOJ as follows:

> 15. SP15 selanjutnya menyatakan punca kematian si mati adalah disebabkan oleh kecederaan di kepala bersesuaian akibat dari kesan hentakan oleh/atau pada objek yang tumpul dan keras serta luas permukaanya. Kecederaan di kepala adalah teruk, lantas boleh membawa kepada kematian.
>
> ...
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> 43. Keterangan SP5 adalah jelas, iaitu kecederaan di kepala mangsa adalah 'sufficient in the ordinary cause of nature to cause death' dan SP5 menyatakan bahawa kecederaan di kepala adalah bersesuaian akibat dari kesan hentakan oleh atau pada objek yang tumpul dan keras serta luas permukaannya. Kecederaan di kepala mangsa dikatakan teruk dan boleh membawa kematian.

[25] We were referred to *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 it where it was said at p 176:

> ... Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.

[26] We were also referred to the Federal Court case of *Pubalan a/l Peremal v Public Prosecutor* [2020] 5 MLJ 442 at p 454; [2020] 5 MLRA 504 at pp 513–514:

> [20] We take this occasion to stress in passing that the outcome of prosecution on a charge for murder does not turn solely on the testimony of the forensic pathologist. The forensic pathologist does not carry the burden of the case. His testimony is a factual and objective presentation of his autopsy finding and his opinions on the correlation of the autopsy finding with other case information. Even though he is called by the prosecution to testify, he is first and foremost an expert witness who should be impartial, objective and independent. In the final analysis, whether the appellant intended to cause such bodily injuries as the knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, are questions which should have been asked of the forensic pathologist by the learned DPP during the trial.

[27] We would need to consider the evidence of PW5 in totality. In his

witness statement as per s 402B(1) of the Criminal Procedure Code (encl 16/71–82), PW5 stated he performed the postmortem on 9 November 2018 at about 6.30pm. He did an external examination and in para 10(c) states as follows:

10. Terdapat kesan-kesan kecederaan luaran pada jasad si mati iaitu:

1. Kulit kepala di bahagian belakang kiri atas bengkak (10 cm x 9 cm).

2. 2 lebam berwarna gelap kebiruan berbentuk separuh bulatan dan bertentangan antara satu sama lain (lebam bahagian bawah agak pudar) di bahagian depan lengan kanan atas. Diameter melintang berukuran 3.5 cm dan diameter menegak berukuran 4 cm.

3. 2 lebam kecil bersama gelap kemerahan berukuran 0.8 cm x 0.5 cm dan

4. 5 cm x 0.5 cm di bahagian belakang lengan kiri atas.

5. Luka koyak serta perdarahan yang ketara di tisu bahagian bawah pintu vagina (posterior fourchette) sehingga ke bahagian bibir dalam vagina (labia minora) di lokasi jam 3 hingga jam 9.

6. Perdarahan di tisu antara bibir luar vagina (labia majora) dan bibir dalam vagina (labia minora) bahagian bawah.

7. Lubang vagina dan lubang selaput dara didapati agak membesar dan tepi bibir selaput dara bengkak.

8. Tepi bibir selaput dara bahagian bawah terkoyak penuh di lokasi jam 3 hingga jam 9.

9. Perdarahan di tepi bibir selaput dara di lokasi jam 3 hingga jam 9 serta pangkal selaput dara di lokasi jam 12.

10. Lapisan kulit di sekeliling lubang dubur (anal verge) koyak di beberapa tempat iaitu di jam 12, 1, 3, 4, 6, 7, 8 dan 10. Terdapat kesan perdarahan dan lebam di sekitar kesan koyakan.

[28] He then stated as follows in para 11:

11. Saya telah menjalankan pemeriksaan dalaman (bedah) dan hasilnya adalah seperti berikut:

(a) Perdarahan di bawah kulit kepala yang banyak di Bahagian belakang sebelah kiri, sebelah kanan atas dan sedikit di bahagian belakang sebelah kanan

(b) Tulang tengkorak pecah di bahagian belakang sebelah kiri dan merebak ke sisi kiri atas dan ke dasar tengkorak bahagian belakang sebelah kiri. Terdapat juga pecah tulang tengkorak di garisan 'coronal suture' sebelah kanan depan atas.

(c) Pengumpulan darah dan darah beku di bawah selaput dura di bahagian sebelah atas dan belakang otak serta di ruang antara kedua-dua belah otak.

(d) Perdarahan di permukaan otak yang meluas (meliputi hampir keseluruhan otak termasuk otak cerebellum dan batang otak).

(e) Otak didapati bengkak, sangat lembut dan mudah pecah. Dinding ruang ventrikel di tengah otak didapati hampir hancur (tisu mati).

(f) Terdapat sedikit cecair kekuningan jernih di dalam kedua-dua rongga dada dan rongga abdomen.

(g) Paru-paru agak sembab.

(h) Pemeriksaan organ-organ dalaman lain tidak menunjukkan sebarang tanda penyakit yang signifikan.

[29] It was also stated in parah 12 that the histological examination of the injured issues (scalp, vaginal tear and dura membrane) showed the injuries were relatively recent (less than three days); and that of the brain showed bleeding on the surface that was relatively recent (less than three days).

[30] The summary of his report is in para 15 as follows:

15. Ringkasan dan rumusan kes ini adalah seperti berikut:

(a) Jasad si mati adalah seorang bayi perempuan berbangsa Melayu dan telah dikenal pastikan seperti nama di atas oleh ibu si mati.

(b) Kecederaan di kepala adalah bersesuaian akibat dari kesan hentakan oleh atau pada objek yang tumpul dan keras serta luas permukaannya. Kecederaan di Kepala adalah teruk dan boleh membawa kematian.

(c) Kecederaan di alat kelamin dan lubang dubur adalah bersesuaian akibat dari kemasukan objek yang tumpul dan keras.

(d) Pemeriksaan oleh Pakar Forensik Odontologi menunjukkan lebam bercorak di lengan atas kanan adalah bersesuaian dengan kecederaan akibat dari gigitan orang dewasa.

(e) Pemeriksaan bedah-siasat dan histologi pada tisu-tisu yang cedera menunjukkan kecederaan-kecederaan tersebut adalah agak baru (kurang 3 hari).

(f) Hasil pemeriksaan bedah siasat yang dijalankan, saya berpendapat sebab kematian adalah kecederaan di kepala akibat hentakan pada objek tumpul dan keras.

[31] As indicated, the head injury was a result of the impact of a hard and blunt object and a large surface area whereby the head injuries are severe and 'boleh membawa kematian'. The cause of death was stated to be due to 'blunt impact to the head'.

[32] It will be readily seen that the internal and external injuries were extensive. These were relatively recent, of less than three days, and tie in with

the timeline of it being inflicted on 7 November 2018 and the death on 9 November 2018. There was also a re-enactment of the incident using a model of a doll with bricks and according to the baby's weight, which showed the head injury can be caused by pme swing to the floor and a horizontal swing to the wall. The injuries were not caused by a fall. Refer to para 16 of the GOJ.

[33] The High Court was therefore correct to find an irresistible inference which showed the injuries were sufficient in the ordinary course of nature to cause death. The High Court went on to find that from the injuries inflicted on the baby, it clearly showed the appellant's intention to cause injury to the baby until the baby met her death (paras 44 and 47–48 of GOJ). The acts of the appellant were as set out in para 46 of GOJ, which we have earlier reproduced in our para 8.

[34] It must be reiterated the High Court stated these acts were intended to kill and not merely to injure (para 47 of GOJ):

> 47. Segala perlakuan Tertuduh yang dilakukan terhadap si mati, kanak-kanak berusia setahun lebih itu adalah berniat untuk mematikan dan bukan sekadar mencederakan. Segala perbuatannya itu dilakukan dengan penuh sedar.

[35] For completeness, we set out too, paras 44 and 48 of the GOJ:

> 44. Melihat kepada kecederaan-kecederaan yang dialami oleh si mati, ia jelas menunjukkan niat Tertuduh untuk menyebabkan kecederaan kepada si mati.
>
> ...
>
> 48. Berdasarkan keterangan saksi-saksi tersebut, sesuatu adalah jelas bahawa Tertuduh adalah orang yang telah menyebabkan cedera kepada si mati, sehingga si mati menemui ajalnya.

[36] To drive home this point, the Privy Council case of *Mohamed Yasin bin Hussin v Public Prosecutor* [1976] 1 MLJ 156 was referred where at p 157 this was said:

> ... was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

[37] In that case too, the evidence was that the injury was of a kind sufficient in the course of nature to cause death by cardiac arrest.

[38] Thus, contrary to the appellant's counsel's submission, the High Court did expressly find that the fatal head injury was intentionally caused by the appellant.

[39] The injuries inflicted on the baby and the evidence of the pathologist were sufficient for the High Court to draw an irresistible inference that the injuries were sufficient in the ordinary course of nature to cause death. What to the appellant was a game of throwing the baby turned out to be a game of death.

[40] The last seen theory was also invoked where the appellant was the only one and the one last seen with the baby. This was as confirmed by none other his wife, PW13.

[41] We find no merit to the first issue.

Second issue: Misdirection by pre-empting the finding of guilt based on the one-sided evidence at the close of the prosecution case

[42] This issue essentially deals with the burden of proof applied.

[43] The appellant's counsel referred to para 73 of the GOJ as follows:

> 73. Di dalam keterangan Tertuduh, ada beberapa perkara yang perlu diberikan perhatian, khususnya yang berbentuk penafian dimana Tertuduh menafikan segala perbuatan yang dimaksudkan itu terhadap si mati. Oleh itu, Mahkamah perlu meneliti samada keterangan Tertuduh itu mencukupi ataupun 'dislodge' keterangan pendakwaan bagi mengalihkan 'kebersalahan' tersebut daripada Tertuduh ...

[44] It was submitted that at the close of the prosecution case, the High Court had already found the appellant guilty and he now had to dislodge the prosecution evidence. The cases referred to were drug trafficking cases where the test of presumption was used which resulted in the appellant having to rebut on a higher burden.

[45] We find that the totality of the High Court's GOJ has to be considered. In para 86, this was said:

> 86. ... saya mendapati bahawa pembelaan yang dikemukakan oleh tertuduh telah gagal sama sekali untuk 'dislodge' kes pihak pendakwaan. Pembelaan tertuduh telah gagal untuk menimbulkan keraguan yang munasabah ke atas kes pendakwaan ... Sebaliknya pihak pendakwaan telah berjaya membuktikan kesnya terhadap tertuduh melampaui keraguan yang munasabah (*beyond a reasonable doubt*). Tidak ada keraguan sama sekali bahawa tertuduhlah yang telah membunuh si mati pada ketentuan masa dan tempat seperti yang dinyatakan di dalam pertuduhan ...

[46] The words 'the accused's defence has failed to raise reasonable doubt on the prosecution case' and 'on the other hand, the prosecution has proved its case beyond a reasonable doubt' which came after the word 'dislodge' would show the correct burden had been used.

[47] We find no merit to the second issue.

Third issue: Defence of intoxication

[48] The third issue was that the High Court had declined to consider the defence of intoxication and this amounted to a misdirection in law.

[49] The High Court in para 81 of the GOJ stated that the taking of syabu on the morning in question was self-inflicted and it was therefore not a defence of merit.

[50] It was contended that s 85(2)(b) of the Penal Code provides that intoxication shall be a defence in exclusion of s 85(2)(a) when the circumstances are such that that the appellant did not know that such act was wrong or he did not know what he was doing. This is because of the word 'or' at the end of s 85(2)(a).

[51] Section 85 provides as follows:

> 85 (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[52] Section 86(3) deems intoxication to include a state produced by narcotics or drugs.

[53] While it may well be that self-infliction of syabu may be considered under s 85(2)(b), the following passages from *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 at pp 412–413 are most instructive:

> [46] ... In dealing with the defence of intoxication advanced by the accused the learned judge said:

A On the issue of intoxication there was no scientific evidence placed before me to support the contention of the defence.

[47] Having said that he considered the conduct of the accused both before and after the commission of the crime and rejected the defence. In our opinion he was correct in doing so. Scientific evidence to prove intoxication can be provided by an analysis of blood and urine samples which will show the level of alcohol in the body. However, it must be observed that such results are not conclusive to determine the degree of intoxication of a person. As Chao Hick Tin JC said in *Public Prosecutor v Ramasamy a/l Sebastian* [1991] 1 MLJ 75 at p 81:

In any event, from the evidence of the experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused. Different people react differently to the same blood alcohol level. It makes a great difference whether the person is or is not an experienced drinker. In our judgment, and here we accept the opinion of Dr Chan (PW15), the more reliable indicator of the state of mind of the accused must be the conduct of the accused immediately prior to and after the offence.

[54] Although that case did say the absence of scientific evidence was not fatal to the defence of intoxication where here, there was no medical report on syabu, but only the say so of the appellant, what is more significant is the conduct of the appellant prior to, at the time of and after the offence. Here there was no evidence from the wife that the behavior of the appellant was consistent with him having taken syabu. In fact, the evidence of syabu was only raised at the defence stage.

[55] Further, we find that the conduct of the appellant prior to, at the time of, and after the offence, were all found to be acts consistent with the commission of the offence and not with the consumption of syabu. So, for instance, the offer of the appellant to take care of the baby, bathe and change her diapers, which were hitherto never done before. Further, the act of washing the bath towel was an act to dispose of the evidence (para 58 of the GOJ). Hence, even if we were to accept that intoxication can be self-inflicted, there was no evidence in the form of conduct to support the defence.

[56] We find no merit in the third issue.

CONCLUSION

[57] For the above reasons, we find that the High Court has correctly applied the law to the facts of the case. There is no error or miscarriage of justice which warrants our appellate intervention. Looking at the totality of the evidence, we find that the conviction and sentence is safe. We affirm the decision of the High Court and the appeal is hereby dismissed.

Decision of High Court affirmed; appeal dismissed.

Reported by Dzulqarnain Ab Fatar